IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 13, 2005

STATE OF TENNESSEE v. JOHNNY MACK LAMB

Appeal from the Criminal Court for Knox County
No. 75803 Ray L. Jenkins, Judge

No. E2005-00809-CCA-R3-CD - Filed March 22, 2006

The Appellant, Johnny Mack Lamb, appeals the sentencing decision of the Knox County Criminal Court which resulted in the imposition of an effective four-year sentence of incarceration. On appeal, Lamb challenges the trial court's denial of alternative sentencing. After review of the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Julie A. Rice, Knoxville, Tennessee, for the Appellant, Johnny Mack Lamb.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Randall E. Nichols, District Attorney General; and John Halstead, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In October of 2002, a Knox County grand jury returned a five-count indictment against the Appellant charging him with two counts of burglary of an automobile, two counts of misdemeanor theft, and one count of possession of burglary tools. The Appellant pled guilty, under the terms of a plea agreement, to both counts of auto burglary and misdemeanor theft, and the possession of burglary tools charge was dismissed. The plea agreement provided that the Appellant would plead guilty as a Range III, persistent offender and receive sentences of four years for each count of burglary of an automobile and eleven months and twenty-nine days for each count of theft, to be served concurrently for a total effective sentence of four years. It was further agreed that the manner of service of the sentences would be determined by the trial court.

The facts, as stipulated at the guilty plea hearing, established that Fort Sanders Hospital Security became suspicious after the Appellant was observed on multiple occasions withdrawing cash from the ATM in the hospital lobby using different ATM cards. Security officers observed him "go in and out of the restrooms, come back, and try to get money out of the machine." After questioning by the Knoxville police, the Appellant admitted that he broke into vehicles owned by Krista Davis and Nicole Shearer, stole their purses, and used their ATM cards to withdraw cash from the teller machine at the hospital. The windows of the two vehicles were found "broken . . . out." At the time of his arrest, the Appellant was found in possession of a hammer, a large screwdriver, the two victims' driver licenses, and their ATM and credit cards.

Following a sentencing hearing, the trial court denied the Appellant's request for probation. This appeal follows.

Analysis

When an accused challenges the length, range, or manner of the service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The court must consider the evidence received at the trial and sentencing hearing, the pre-sentence report, the principles of sentencing, arguments of counsel, the nature and characteristics of the offense, mitigating and enhancing factors, statements made by the offender, and the potential for rehabilitation. *Ashby*, 823 S.W.2d at 168; *see also* T.C.A. § 40-35-210 (2003). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d), Sentencing Commission Comments.

A defendant convicted of a Class C, D, or E felony and sentenced as an especially mitigated or standard offender is "presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2003). Although a defendant may be presumed a favorable candidate for alternative sentencing, the defendant has the burden of establishing suitability for total probation. T.C.A. § 40-35-303(b) (2003); *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Even though probation must be automatically considered, "the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303(b), Sentencing Commission Comments; *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). In determining whether to grant or deny probation, a trial court should consider the circumstances of the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, and the best interest of the defendant and the public. *State v. Greer*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Boyd*, 925 S.W.2d 237, 244 (Tenn. Crim. App. 1995). A trial court must acknowledge one of the following considerations before imposing a sentence of total confinement:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1) (2003).

The Appellant in this case pled guilty to Class E felonies, as a Range III, persistent offender, and to Class A misdemeanors. Based upon his felony convictions as a persistent offender, he receives no presumption in favor of alternative sentencing. *See* T.C.A. § 40-35-102(6). The Appellant admits that he should not receive presumed status as a favorable candidate for alternative sentencing,[1] that he has a lengthy criminal history, and that he has violated parole in the past. Nonetheless, he asserts that he should receive a non-incarcerative sentence because since his arrest on the current charges, "he has been successfully conforming his conduct to that required of law-abiding society with the exception of an alleged but not yet proven charge of public intoxication." Moreover, he claims that he has disassociated himself from his criminal confederates, maintained employment, and provided constant care for his ailing wife, who is in dire need of gastric bypass surgery.

The proof at the sentencing hearing established that the Appellant was forty-three years old and lived with his bedridden wife. He dropped out of school in the tenth grade. The pre-sentence report reflects that the Appellant began working as a laborer for Aacklendz Pools and Spas on March 1, 2004. He had previously been self-employed as a Bobcat operator and, at the time of sentencing, was unemployed and caring for his wife full-time. The Appellant's prior criminal history, which spans twenty-five years, reflects seventeen prior convictions, including five larceny convictions, four burglary convictions, and one theft conviction. Additionally, the pre-sentence report indicates that the Appellant has twice been found in violation of parole.

At the sentencing hearing, evidence was presented that neither the Community Alternatives to Prison Program (CAPP) report nor the Enhanced Probation report advocated the Appellant's placement in an alternative sentencing program. These reports also indicate that the Appellant was on probation for a public intoxication conviction at the time of his arrest and had a "high probability of having a substance dependance disorder (SDD)," with a recommendation of drug and alcohol treatment. The record also reflects that, at the time of sentencing, the Appellant had a pending charge for public intoxication.

[1]Notwithstanding the Appellant's pursuit of an alternative sentencing option on appeal, the plea bargain agreement provided that the Appellant could "apply for probation," and, at the sentencing hearing, he requested only that he be granted probation.

Our review of the record reveals that the trial court considered the Appellant's "interest, behavioral records, employment history, social history, . . . the interests of the public, and need of deterrence of the kind of the crime for which the defendant has committed[,] . . . [t]he defendant's failure to accept responsibility for his wrong[,] . . . [h]is demonstrated lack of self discipline, [and] his failure and refusal to bring his conduct in line with conduct that is required in a civilized society . . . ." From these comments, we discern the holding to be that "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct." *See* T.C.A. § 40-35-103(1)(A). Moreover, the Appellant's prior parole violations demonstrate that "[m]easures less restrictive than confinement have . . . been applied unsuccessfully to the defendant." *See* T.C.A. § 40-35-103(1)(C). The Appellant's claim that the trial court failed to consider mitigating factors is unsubstantiated. The record reveals that the trial court properly considered the Appellant's present circumstances and recommendations from sentencing authorities. Because the Appellant was convicted as a persistent offender, it is his burden to establish that his sentences of four years in confinement are improper and that he is suitable for probation. After *de novo* review, we conclude that the Appellant has failed to carry this burden.

CONCLUSION

Based upon the foregoing, we affirm the Knox County Criminal Court's imposition of an effective four-year sentence of incarceration.

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DAVID G. HAYES, JUDGE